

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NATURAL RESOURCES DEFENSE	:	PLAINTIFF'S STATEMENT
COUNCIL, INC.,	:	PURSUANT TO LOCAL CIVIL
	:	RULE 56.1
Plaintiff,	:	
	:	08 Civ. 2443 (DLC)
- v. -	:	
UNITED STATES ENVIRONMENTAL	:	ECF Case
PROTECTION AGENCY,	:	
	:	
Defendant.	:	

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Plaintiff's Statement Under Local Civil Rule 56.1

Pursuant to Rule 56.1(b) of the Local Civil Rules of the United States District Court for the Southern District of New York, Plaintiff Natural Resources Defense Council, Inc. (“NRDC”) states the following material facts as to which there is no genuine issue in support of Plaintiff’s motion for summary judgment, as follows:

1. NRDC is a not-for-profit, environmental membership organization with headquarters in New York, New York. (Declaration of Aaron Colangelo (“Colangelo Decl.”) ¶ 2, dated May 29, 2008.)
2. Founded in 1970, NRDC represents more than 420,000 members and activists nationwide. (Id.)
3. Consistent with its mission, NRDC has a long-standing interest in improving the regulation of pesticides and other toxic chemical residues in food, air, and water. NRDC seeks to ensure that pesticide regulation is protective of the public health and in compliance with governing statutes. (Id. ¶ 3.)

4. NRDC has litigated major cases seeking to require the United States Environmental Protection Agency (“EPA”) to comply with its legal obligations to protect the public from pesticides, and has actively participated in the development, enforcement, and reform of pesticide laws and regulations for over two decades. (Id.)
5. Over the last two decades, NRDC has advocated that pesticide products containing ethylene bisdithiocarbamate (“EBDCs”) should be more carefully regulated by EPA. Among other health concerns, NRDC has long warned that widespread use of EBDCs could result in dangerously high levels of exposure to ethylenethiourea (“ETU”), a carcinogenic chemical that is produced when EBDCs degrade or the pesticides’ residue on fruits or vegetables is digested by the human body. (Id. ¶ 4.)
6. In 1989, NRDC attorney Janet Hathaway was quoted in *The New York Times* as warning that “[t]he risk of developing cancer from the use of EBDCs on potatoes and tomatoes alone is vastly in excess of the level the EPA considers safe.” (Id. ¶ 4, Ex. A.)
7. On December 13, 2007, NRDC sent a request to the United States Environmental Protection Agency (“EPA”) for the disclosure of records pursuant to the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* (“FOIA”), and the applicable EPA regulations, 40 C.F.R. § 2.100 *et seq.*, reflecting or relating to any contacts, meetings, or communications with pesticide registrants and other outside entities or individuals concerning EBDC and pesticide products containing EBDC (including, but not limited to, mancozeb, maneb, and metiram) since August 18, 2003. (Id. ¶ 5, Ex. B.)
8. NRDC requested a public interest fee waiver in connection with its December 13, 2007 FOIA request. (Id.)

9. In support of this fee waiver request, NRDC submitted exhibits demonstrating that EBDCs are pesticides of widespread public health concern. (Id. Ex. B (FOIA request Exhibits A and B).)
10. NRDC also submitted 37 attachments demonstrating NRDC's long track record of digesting and disseminating information obtained through FOIA quickly and effectively, through its web site, its own publications, major media outlets, and other public fora. (Id. (FOIA request Attachments 1 through 37).)
11. By letter dated December 28, 2007, EPA denied NRDC's fee waiver request. (Id. ¶ 6, Ex. C.)
12. EPA stated in its December 28, 2007 letter that it was denying NRDC's fee waiver request for the following reason: "the material requested is not in the public interest because it is not likely to contribute significantly to public understanding of government operations or activities." The letter did not provide any additional explanation for the denial. (Id. Ex. C.)
13. NRDC filed a timely administrative appeal of the fee waiver denial on January 25, 2008. (Id. ¶ 7, Ex. D.)
14. Attached to the administrative appeal, NRDC provided EPA with additional material substantiating its entitlement to a fee waiver for its December 13, 2007 FOIA request. (Id. Ex. D at Appendices C-K.)
15. Some of the exhibits attached to NRDC's administrative appeal related to the matter of Request to Reduce Pre-Harvest Interval (PHI) for EBDC Fungicides on Potatoes, EPA-HQ-OPP-2007-0181. (Id. Ex. D at Appendices C-H.)

16. More than fifteen years ago, EPA determined that EBDCs posed unreasonable risks to human health – in particular, unreasonable cancer risks to children – when used on potatoes within 14 days of harvest. (Id. Ex. D at 4-5, Appendix C (1992 notice of intent to cancel).)
17. On July 11, 2007, EPA initiated an administrative proceeding, in response to a petition from the pesticide industry, to reverse its 1992 determination. (Id. Ex. D at 4-5, Appendix D (July 2007 notice of intent to modify cancellation).)
18. After NRDC appeared in the proceeding and requested a hearing before an Administrative Law Judge (“ALJ”), EPA jointly filed a series of motions with the EBDC manufacturers, seeking to narrow the scope of the ALJ’s review. (Id. Ex. D at 4-5, Appendices E-H (EPA/industry joint motions and NRDC replies).)
19. NRDC also submitted exhibits in support of its administrative appeal of the fee waiver denial regarding two other, similar matters in which NRDC made FOIA requests regarding EPA contacts, meetings, and communications with pesticide manufacturers and other outside entities. (Id. Ex. D at 5, Appendices I-K.)
20. NRDC had requested under FOIA records relating to EPA’s reversal of safety measures intended to protect children from exposure to rat poison and discovered that the reversal had been the result of pesticide industry pressure. (Id. Ex. D at 5, Appendices I & J.)
21. NRDC had also requested under FOIA records relating to contacts, meetings, and communications regarding the pesticide atrazine between the pesticide manufacturer Syngenta (and its high-profile lobbyists, such as former Senator Bob Dole) and EPA and White House officials, which demonstrated the influence of industry pressure on EPA’s

decision to allow continued use of atrazine. (Id. Ex. B at Attachments 24-25; Ex. D at 5, Appendix K.)

22. Both the rat poison FOIA and the atrazine FOIA resulted in the disclosure of information that received significant news coverage, and both disclosures were made pursuant to a FOIA public interest fee waiver granted to NRDC by EPA. (Id. at 5.)
23. Subsequent to filing its administrative appeal of EPA's fee waiver denial, NRDC did not receive any response from EPA regarding its December 13, 2007 FOIA request until after NRDC commenced this action against EPA on March 11, 2008. (Id. ¶ 8.)

Dated: June 3, 2008
Washington, DC

Respectfully submitted,

s/
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